the defendant or if the father should fail in his claim thereof, the charging of the second lot of 120,000 shares in Top Ten may be substituted in place of the $100,000 banker's guarantee under (i) above.

The condition should be complied with within 30 days.

Subsequently, pursuant to a request of the defendant, a third option was granted to the defendant in case he would want to dispose of his shares in Top Ten. The condition was: the defendant to furnish a banker's guarantee for the sum of $300,000, in terms satisfactory to the registrar.

Order accordingly.

Solicitors: *Allen & Gledhill*; *B Mohan Singh & Co.*

Reported by *Ng Sheau Jiuan*

Thomas M Heysek & Anor v Boyden World Corporation

HIGH COURT (SINGAPORE) – MOTION IN SUIT NO 1094 OF 1988
CHAN SEK KEONG J
12 OCTOBER 1988

Civil Procedure – Interlocutory mandatory injunction sought – Substantially the entire relief claimed – Principles upon which injunction to be granted

The defendants had by a licence agreement (which replaced an earlier licence agreement) granted to the second plaintiff an exclusive licence to operate an executive recruiting business in Singapore, Indonesia and Brunei and in connection therewith to use the name 'Boyden', to employ the defendants' symbols, methods and systems of operation and to establish offices in those territories. By a stock purchase agreement the first plaintiff, having acquired all the shares in the second plaintiff (which shares were originally owned by the defendants), agreed to pay to the defendants the balance of the purchase price then outstanding. Some time later, the defendants served a notice of termination on the second plaintiff under the licence agreement on the ground that the second defendant had defaulted in the payment of fees under the licence agreement and that the first plaintiff had defaulted in the payment of instalments of the purchase price under the stock purchase agreement.

The plaintiffs commenced proceedings in which they sought, inter alia, a declaration that the licence agreement was wrongfully terminated and, in the alternative, damages for wrongful termination.

The defendants, having filed their defence and counterclaim for damages and a prohibitory injunction, filed a motion for an interlocutory mandatory injunction (a) to restrain the first plaintiff and the second plaintiff from (i) using or carrying on any business in Singapore using the name 'Boyden' or any other name resembling 'Boyden'; (ii) using or continuing to use the word and character 'Boyden' as part of their name and character or logo and to cause the second plaintiff's corporate name to be changed to another name that does not resemble 'Boyden' and (b) to deliver up to the defendants' solicitors all their files and records kept in connection with the licence agreement and their recruitment business.

Held, granting the application:

(1) Although the relief that was sought by the defendants was interim in form, it was, in the circumstances of the case, mandatory in effect. If granted, it prohibited the second plaintiff from carrying on business as the exclusive licensees of the defendants. It would have the effect of altering the status quo rather than preserving it. Accordingly, a court should be slow in granting it.

(2) In the present case, the defendants' application, if granted, would amount to substantially the entire relief claimed in the action. On the basis of the English Court of Appeal decision in *Locabail International Finance Ltd* v *Agroexport*,[2] the defendants were therefore required to show a clear case for relief or a high degree of assurance that the injunction, if granted, would rightly be granted.

(3) However, the high degree of assurance required may be mitigated by the justice of the case, which principle was stated in the decision in *Films Rover Ltd* v *Cannon Film Sales Ltd*.[3] On the basis of that decision, a less rigorous test was required where the withholding of a mandatory injunction may carry a greater risk of injustice than in granting it.

(4) On the documentary evidence in the instant case, the court was satisfied that there was a high assurance of the defendants succeeding in their counterclaim if the dispute should go to trial. However, if that finding was a wrong finding, the court was also of the view that there was a greater risk of injustice in withholding the injunction than in granting it. The plaintiffs had realized that whatever the result of the action might be, the business relationship between them and the defendants was dead and the first plaintiff had in fact admitted in his own words that the plaintiffs had stopped operating business under the name 'Boyden' as the defendants had refused to cooperate with the plaintiffs. The plaintiffs had offered an undertaking that they would not continue to operate any business and trade under the 'Boyden' name. However, they continued to refuse to change their corporate name by deleting 'Boyden' from it and thereby prevented the defendants from registering their own company with the name 'Boyden' and commencing their own business in Singapore. Furthermore, by virtue of cl 12 of the licence agreement, the defendants could still, in any event cause the automatic termination of the licence agreement by giving the required notice.

(5) If the termination was wrongful, the second plaintiff was entitled to damages and it was clear that in the circumstances of the case damages would be an adequate remedy.

Cases referred to

1 *Shepherd Homes Ltd* v *Sandham* [1971] Ch 340 (folld)
2 *Locabail International Finance Ltd* v *Agroexport* [1986] 1 WLR 657 (folld)
3 *Films Rover International* v *Cannon Film Sales Ltd* [1987] 1 WLR 670 (folld)

Koh Kok Wah for the defendants/applicants.
Tan Aye See (Ms) for the plaintiff/respondent.

Cur Adv Vult

Chan Sek Keong J: This is a motion for an interlocutory mandatory injunction (1) to restrain the first plaintiff and

the second plaintiff from (a) using or carrying on any business in Singapore using the name 'Boyden' or any other name resembling 'Boyden'; (b) using or continuing to use the word and character 'Boyden' as part of their name, character or logo and to cause its corporate name to be changed to another name that does not resemble 'Boyden', and (2) to deliver up to the defendants' solicitors all their files and records kept in connection with the licence agreement and its recruitment business.

It is not disputed between the parties that the name 'Boyden' belongs to the defendants and that it cannot be used by the first plaintiff or the second plaintiff as part of his or its name or business without the consent of the defendants.

It is also not disputed that the defendants had, by a licence agreement dated 1 September 1986 (which replaced an earlier licence agreement dated 30 December 1984) granted to the second plaintiff an exclusive licence to operate an executive recruiting business in Singapore, Indonesia and Brunei ('the territories') and in connection therewith to use the name 'Boyden', to employ the defendants' symbols, methods and systems of operation and to establish offices in the territories. By cl 3 of the licence agreement, the initial term of the licence would expire on 31 December 1989 and would thereafter be automatically extended for successive periods of one year each, unless at least 180 days prior to the expiry of the initial term or any extension thereof, notice of termination is given by either party in writing. By cl 4 of the licence agreement, both parties shall, upon any termination, have equal access to the files and, if requested by either party, duplicate copies shall be made and each party shall keep a set. By cl 12 of the licence agreement, the defendants had the right upon written notification to the second plaintiff to terminate the licence agreement upon the occurrence of any of the events of default set out in that provision. The material events of default, in so far as this action is concerned, are defaults for more than 30 days in respect of any payment required to be paid under the terms of the licence agreement or the associated stock purchase agreement.

It is also not disputed that the stock purchase agreement referred to is that agreement dated 1 September 1986 under which the first plaintiff, having acquired all the shares in the second plaintiff (which shares were originally owned by the defendants), agreed to pay to the defendants the balance of the purchase price then outstanding (which as stated therein is US$202,600 but which according to the first plaintiff should be US$185,000) in 14 monthly instalments of unequal amounts ('the stock purchase instalments') with the last instalment of US$16,000 due and payable on 1 October 1987.

On 11 April 1988, the first plaintiff received from the defendants a formal notice of default dated 6 April 1988. This notice informed the first plaintiff of defaults under the licence agreement in relation to certain sums of money which have to be paid by the first plaintiff. These sums (as set out in a memorandum dated 25 May 1988 from the defendants to the first plaintiff) amounted to US$158,000 being arrears of payments under the stock purchase agreement as well as licence fees under the licence agreement. The said notice also informed the first plaintiff of the grace period (30 days) available to him under cl 12 of the licence agreement to remedy the defaults.

On 25 April 1988, the first plaintiff met with the full board of directors of the defendants during which he requested an extension of time to remedy the defaults. By a letter dated 26 April 1988 which was hand delivered to the first plaintiff, the defendants denied the request and required the first plaintiff to make good the defaults by 10 May 1988. This letter also requested the first plaintiff to apply for any adjustments to the amount claimed in the defendants' memorandum of 25 May 1988 as soon as possible, failing which the defendants would insist on payment of US$158,000.

On 26 May 1988, the defendants served a notice of termination on the second plaintiff under cl 12 of the licence agreement on the ground that the second plaintiff had defaulted in the payment of fees under the licence agreement and the first plaintiff had defaulted in the payment of instalments of the purchase price under the stock purchase agreement.

On 3 June 1988, the first and second plaintiffs commenced proceedings in the High Court in which they sought, inter alia, a declaration that the licence agreement was wrongfully terminated and, in the alternative, damages for wrongful termination.

The statement of claim indorsed on the writ states, inter alia, the following grounds upon which the plaintiffs claimed that the termination of the licence agreement was wrongful. They are:

(i) Paragraph 13:

> It was orally agreed between the parties that in consideration of the plaintiffs paying the full purchase price of the stocks in the second plaintiff to Boyden Associates Inc within a 13-month period as opposed to the usual 36- or 48-month period granted to other Boyden Associates internationally, the plaintiffs would be allowed to defer payment of the licence fees until after full payment of the stock purchase price has been made.

(ii) Paragraph 14:

> Boyden Acquisition Corporation has not received nor has it since 1985 demanded or requested for payment of any licence fee from the first and second plaintiffs and

the plaintiffs contend that the defendant is estopped from demanding such payment in accordance with the arrangements agreed upon by the parties to this action.

On the same day, they applied ex parte to the court for and obtained an interim injunction to restrain the defendants as follows:

(a) from preventing the plaintiffs from continuing to operate the business of the second plaintiff as an executive search and recruitment business;
(b) from preventing the plaintiffs from continuing to use the name 'Boyden' in connection with their business as an executive search and recruitment business;
(c) from withholding from the plaintiffs the facilities provided under the licence agreement dated 1 September 1986 entered into between the plaintiffs and the defendants;
(d) from interfering with the second plaintiff's business by approaching its clients and serving them with notice of termination of the licence agreement.

In an affidavit sworn on 3 June 1988, filed in support of this application, the first plaintiff deposed, in cl 16 thereof, that as early as the 1984 licence agreement, he had not paid any licence fee to date and that the defendants had never requested for or demanded payment of the same because the defendants' treasurer and senior vice-president for Finance and Administration, one Richard D Foy, had orally agreed with him that such payments (which, under the terms of the licence agreement, were payable quarterly) be deferred until all the stock purchase instalments have been paid. As regards the stock purchase instalments, the first plaintiff deposed that they had been kept up to date and that the balance due was only US$23,404.57. The first plaintiff further claimed that the purported termination was wrongfully made as an excuse to oust him from a company which he had built up and to punish him for having complained of the managerial incompetence of the board of directors of the defendants.

The defendants' application to discharge the interim injunction was heard by Judicial Commissioner Mr Chao Hick Tin on 7 June 1988. The defendants filed an affidavit denying any oral agreement with the first plaintiff as regards the deferment of the payment of the licence fees. They also claimed that in any event, the last day for payment of the final instalment of the stock purchase instalments was 1 October 1987 and that the first plaintiff was in breach of the terms of the stock purchase agreement in failing to pay that instalment. The defendants also relied on cll 12(a) and 20(a) & (c) of the licence agreement which provide as follows:

12 Default

(a) In the event licensee defaults in any payment required by the terms hereof for more than thirty (30) days, or licensee defaults in any payment required by the associated stock purchase agreement for more than thirty (30) days, unless such default in payment by licensee is caused by intervention by a governmental entity having jurisdiction over licensee ... the effect of which shall be to prohibit performance by licensee of its obligations to licensor, ... which is not remedied within thirty (30) days after notice has been sent from licensor to licensee, ... then in any such event, upon the written notification by the licensor to the licensee, this agreement shall be terminated ... and thereafter licensee shall have no right to conduct the executive recruiting business, and licensee shall immediately refrain and desist from using the name or character 'Boyden' or any logo, format or symbol in connection therewith in accordance with the provisions of this agreement ... Any waiver by licensor of any default to any term or condition of this agreement shall not be construed as a modification or alteration of the terms of a contract and shall not prejudice any of the rights of licensor or relieve the obligations and responsibilities of licensee and shall not constitute a waiver of any other term or condition of this agreement or a waiver of any future breach of such term or condition.

20 Waiver, modification etc

(a) No waiver, modification, amendment, alteration or cancellation of any term or condition of this agreement shall be effective unless in writing. Nor shall any waivers be deemed to excuse the performance of any act other than those specifically referred to in such written notice or waiver. Licensor makes no warranties or representations herein other than those specifically expressed.

(b) Except as otherwise provided herein, this agreement contains the entire agreement between the parties hereto with respect to the transactions contemplated hereby, and supersedes any prior agreement between the parties with respect to these transactions.

It was also contended that the alleged oral agreement was unenforceable for lack of consideration.

The learned judicial commissioner discharged the interlocutory injunction on three separate and distinct grounds:

(1) there were no merits in the application (ie there was no serious question to be tried);
(2) the interim injunction was in some respects in the nature of a mandatory injunction and should not in the circumstances of the case be granted;
(3) damages were an adequate remedy.

The first plaintiff and the second plaintiff have appealed against the order of the judicial commissioner. As such, it would be improper for me to consider or comment on the reasons given by the judicial commissioner except to the extent that the same point has been argued before me and that point is necessary to a proper determination of the issue before me.

The defendants, having filed their defence and counterclaim for damages and a prohibitory injunction, move this court for an injunction in the terms I have set out earlier. Although the relief that is being sought by the

defendants is interim in form, it is, in the circumstances of this case, mandatory in effect. If granted, it prohibits the second plaintiff from carrying on business as the exclusive licensee of the defendants. It has the effect of altering the status quo rather than preserving it. Accordingly, a court should be slow in granting it.

In *Shepherd Homes Ltd* v *Sandham*[1] Megarry J said:

> In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

In *Locabail International Finance Ltd* v *Agroexport*,[2] the Court of Appeal approved Megarry J's statement. In respect of the application before the court, Mustill LJ said (at p 664):

> The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

In the present case, the defendants' application if granted, would amount to substantially the entire relief claimed in the action. On the basis of the Court of Appeal's decision in *Locabail International Finance Ltd* v *Agroexport*,[2] the defendants are therefore required to show a clear case for relief or a high degree of assurance that the injunction, if granted, is rightly granted.

However, the high degree of assurance required may be mitigated by the justice of the case. In *Films Rover International* v *Cannon Film Sales Ltd*,[3] Hoffmann J did not accept Megarry J's statement as one of principle but merely as a guideline. In that case, Hoffmann J was faced with a situation in which one party was being subjected to some form of duress. In essence, the facts were that the relevant plaintiff claimed that the defendant was obliged, under an agreement, to deliver certain films which the plaintiff wished to distribute abroad. The defendant withheld the films in order to put pressure on the plaintiff to negotiate new (and better) terms for the defendant. The plaintiff, being placed in a position of having to capitulate or having no films, applied for a mandatory injunction. The defendant pleaded that there was no binding agreement between the parties. The application was dismissed by the court on this ground. On appeal, the Court of Appeal held that this issue should go to trial. The application for the mandatory injunction was then re-heard by Hoffmann J who came to the conclusion that if the injunction was not granted (a) the plaintiffs might be forced to re-negotiate with the result that although they might have a good case they might be unable to bring it to trial and (b) it would enable the defendants to achieve a commercial objective by calculated disregard of the basic principle of a civil society that 'men perform their covenants when made'.

In granting the injunction, Hoffmann J said:

> ... there is no inconsistency between the passage from Megarry J and what was said in the *Cyanamid* case [1975] AC 396. But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', ie useful generalizations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.
>
> The passage quoted from Megarry J in *Shepherd Homes Ltd* v *Sandham* [1971] Ch 340, 351, qualified as it was by the words 'in a normal case', was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which justify describing an injunction as 'mandatory' will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a 'high degree of assurance' that the plaintiff would be able to establish his right at a trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline of 'exceptional' and therefore requiring special treatment. *If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.* (my emphasis)
>
> ... the Court of Appeal in *Locabail International Finance Ltd* v *Agroexport* [1986] 1 WLR 657, 664, was not intending to 'fetter the court's discretion by laying down any rules which would have the effect of limiting the flexibility of the remedy', to quote Lord Diplock in the *Cyanamid* case [1975] AC 396, 407. Just as the *Cyanamid* guidelines for prohibitory injunctions which require a plaintiff to show no more than an arguable case recognize the existence of exceptions in which more is required (compare *Cayne* v *Global Natural Resources Plc* [1984] 1 All ER 225), so the guideline approved for mandatory injunctions in the *Locabail* case recognizes that there may be cases in which less is sufficient.

On the basis of Hoffmann J's decision, a less rigorous test is required where the withholding of a mandatory injunction may carry a greater risk of injustice than in granting it.

For the hearing before me, the first plaintiff has, in his affidavit of 18 August 1988, (a) repeated his allegation that there was an oral agreement by which the payment of the licence fees would be deferred until the stock purchase prices have been fully paid and (b) made a new allegation that the stock purchase agreement produced by the defendants was not authentic in that p 2 thereof (which sets out the stock purchase instalments) had been altered without the first plaintiff's knowledge.

With regard to allegation (a), the first plaintiff has not been able to say when the oral agreement was entered into. There is also no documentary evidence, contemporaneous with or after the alleged event, which supports this allegation. The first plaintiff could have raised this issue upon the receipt of the defendants' formal notice dated 6 April 1988 but he appeared to have failed to do so at his meeting with the defendants on 25 May 1988. The most substantial piece of evidence he can rely on is his assertion in para 4(a) of his affidavit of 18 August 1988:

> That the plaintiffs relied upon the representation of Mr Richard Foy, treasurer and senior vice-president of the defendant company that there would be a loose financial relationship between the parties and that the strict terms of the licence agreement and the stock purchase agreement would not be rigidly adhered to and that the plaintiffs would be allowed to pay off the stock purchase price before payment to be made on licence fees would be due, when he entered into the two agreements.

The said para 4(a) contains a fresh allegation that Richard Foy had represented to him that the strict terms of the licence agreement as well as the stock purchase agreement would not be rigidly adhered to. It is a departure from his original stance that the deferment was in respect of licence fees only. The assertion is obviously made with a view to supplementing his omission to say anything about the deferment of payment of the stock purchase instalments and to meeting the defence of the defendants in this action. What the first plaintiff has not realized is that this allegation contradicts para 13 of the statement of claim where the plaintiffs have admitted that they had agreed to pay the stock purchase consideration in 13 months instead of the normal 36 or 48 months granted to other Boyden associates internationally in consideration for which the second plaintiff would be allowed to defer the payment of the licence fee. Accordingly, allegation (a) has no substance. In any case, by virtue of cl 12 and/or cl 20 of the licence agreement, any waiver as to time of payment would have been nullified by the first notice of 6 April 1988.

With regard to allegation (b), the first plaintiff has produced a copy of a draft of the stock purchase agreement, p 2 of which shows that the instalment payable on 1 November 1986 was US$10,000 instead of US$27,600 as shown on p 2 of the copy of the agreement produced by the defendants. He has also produced copies of certain statements emanating from the defendants which state that the amount outstanding in respect of the stock purchase instalments as at the date of the stock purchase agreement was US$185,000 instead of US$202,600 (the difference being US$17,600) as shown on p 2. On this basis, the plaintiffs have contended that the copy of the stock purchase agreement produced by the defendants was not authentic or that the defendants have made an unauthorized amendment to the stock purchase agreement in respect of a term which went to the root of the contract.

Both allegation (b) and the legal submission have no substance. As regards the allegation, firstly, Richard Foy in his affidavit dated 27 June 1988 has explained that the additional US$17,600 were cumulative arrears of licence fees payable by the second plaintiff as at September 1986 and was brought into account as part of the purchase price under the 1986 stock purchase agreement. Secondly, the copy of p 2 of the stock purchase agreement produced by the defendants bears the initial of a signatory next to the instalment of US$27,600. The first plaintiff has not challenged the authenticity or authority of this initial.

In any case, even if I am wrong in finding that allegation (b) has no substance, the omission of the additional sum of US$17,600 from the relevant instalment would still leave the first plaintiff in default as he has initially admitted that the balance due was US$23,404.57.

As regards the legal submission, it has no merit whatever in that alteration of the amount of the instalment, even if unauthorized, does not make the agreement unauthentic or go to the root of the contract. The court will simply disregard it as a unilateral amendment which has no effect.

Accordingly, on the documentary evidence before me, I am satisfied that there is a high assurance of the defendants succeeding in their counterclaim if the dispute should come to trial.

However, if I am wrong in this finding, I am also of the view that there is a greater risk of injustice in withholding the injunction than in granting it. The plaintiffs have realized that whatever may be the ultimate result of this action, the business relationship between them and the defendants is dead. In his affidavit of 18 August 1988, the first plaintiff has admitted that since the discharge of the plaintiffs' interim injunction on 7 June 1988, the plaintiffs have 'stopped operating business under the name 'Boyden' as I realized that I would not be able to do so in the light of the defendants' refusal to cooperate'. In consequence, the plaintiffs have, in the first plaintiff's affidavit as well as through counsel, offered to give an undertaking to the court and the defendants that they would not continue to operate any business and trade under the 'Boyden' name. However,

they continue to refuse to change their corporate name by deleting 'Boyden' from it and thereby prevent, until the trial of the action, the defendants from registering their own company with the name 'Boyden' and commencing their own business in Singapore. Furthermore, the plaintiffs also would have realized that by virtue of cl 12 of the licence agreement, the defendants can still, in any event, cause the automatic termination of the licence agreement by giving notice of their intention not to renew it within 18 months prior to the expiry of the initial term. So the business relationship cannot be saved without the consent of the defendants. The second plaintiff is not entirely unprotected. If the termination were wrongful, it is entitled to damages and it is clear that in the circumstances of this case damages would be an adequate remedy. Therefore both commercial sense and commercial reality demand an end to the dog in the manger attitude of the plaintiffs.

In the premises, whether Megarry J's test or Hoffmann J's formulation is applied, the defendants are entitled to succeed.

Accordingly, I make an order in terms of prayer 1(a) and (b) of the motion. There will also be an order on prayer 2 limited to delivery of a duplicate set of the files kept in connection with the business within 30 days hereof and, if the duplication is done by the plaintiffs, upon payment by the defendants of a reasonable sum for copying charges. The costs of this motion will be costs in the cause.

Application allowed.

Solicitors: *Arthur Loke & Partners*; *AC Fergusson.*

Reported by *PS Ranjan*

MALAYSIAN REPORTS

Public Prosecutor v Lee Chan Sang

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CRIMINAL APPEAL NO 9 OF 1988
HASHIM YEOP A SANI AG CJ (MALAYA), MOHAMED YUSOFF SCJ AND AJAIB SINGH J
30 NOVEMBER AND 20 DECEMBER 1988

Criminal Procedure – Charge of trafficking in dangerous drugs – Triable only in the High Court – Accused produced in Magistrate's Court – Charge against some of the accused including respondent withdrawn by prosecuting officer – Respondent and other accused acquitted and discharged – Respondent subsequently rearrested and charged for offence under Dangerous Drugs Act – Written consent of Public Prosecutor – Plea of autrefois acquit – Plea upheld in High Court – Magistrate's Court has no jurisdiction even to record plea – No trial in Magistrate's Court – Plea of autrefois acquit cannot succeed – Criminal Procedure Code (FMS Cap 6), ss 254 & 302 – Dangerous Drugs Act 1952, ss 39B & 41A – Federal Constitution, arts 7(2) & 145(3)

Constitutional Law – Plea of autrefois acquit – When available – Federal Constitution, art 7(2)

Words and Phrases – 'autrefois acquit'

In this case, the respondent and some other accused were charged in the Magistrate's Court with trafficking in dangerous drugs. The respondent and the other accused were produced in the Magistrate's Court. The prosecuting officer withdrew the charge against the respondent and some of the other accused, leaving only one accused, Lim Kim Thiar, against whom an amended charge was preferred. The prosecuting officer also tendered the written consent of the Public Prosecutor for the prosecution of Lim Kim Thiar. The magistrate committed Lim Kim Thiar for trial in the High Court and acquitted and discharged the respondent and the other accused. Subsequently, the respondent was rearrested and charged for an offence under the Dangerous Drugs Act 1952. The consent of the Public Prosecutor was issued for the prosecution. When the respondent was produced before the High Court, a plea of autrefois acquit was entered and this was upheld by the learned judge. The Public Prosecutor appealed.

Held, allowing the appeal:

(1) Section 41A of the Dangerous Drugs Act 1952 confers jurisdiction on the Magistrate's Court only in so far as to receive the production of the accused person and to have the charge explained to him and then to transmit the case to the High Court forthwith without holding a preliminary inquiry. The Magistrate's Court has no jurisdiction even to record a plea of the charge.

(2) Section 39B of the Dangerous Drugs Act 1952 provides that a prosecution under that section shall not be instituted except by or with the consent of the Public Prosecutor. Where a person is produced before a court but before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead. It is also provided that the case shall not be further prosecuted until the consent has been obtained. In this case, the consent of the Public Prosecutor in respect of the respondent was only issued after he was rearrested and charged in court on the subsequent charge.

(3) On a proper reading of s 39B and s 41A of the Dangerous Drugs Act 1952, it is clear that s 254 of the Criminal